Port Klang Authority v Datin Paduka Phang Oi Choo @ Phang Ai Tu (Tan Sri Datuk G Gnanalingam & Ors, third parties)

HIGH COURT (SHAH ALAM) — SUIT NO 22–1500 OF 2009
GUNALAN MUNIANDY JC
13 OCTOBER 2015

Civil Procedure — Striking out — Statement of claim — Plaintiff brought action against defendant for breaches of statutory duties — Defendant commenced third party proceedings and sought contribution and/or indemnity from third party — Whether third party appointed as member of board according to the Port Authorities Act 1963 — Whether third party could be held liable and collectively responsible for decision made by board members of plaintiff — Whether defendant's claim unsustainable and ought to be struck out — Port Authorities Act 1963 — Rules of Court 2012 O 18 r 19(1)(b), (c) & (d)

The Port Klang Authority ('the plaintiff') brought an action against the defendant premised on breaches of fiduciary duties by the defendant which caused loss and damage to the plaintiff in relation to the Port Kelang Free Zone Project ('the project'). The defendant in turn filed a third party proceedings against board members of the plaintiff and sought contribution from the board members on the ground that they were jointly involved in the collective decision making process for the project. In response to the third party proceedings, the seventh third party ('TP7') had filed the present application to struck out the defendant's statement of claim pursuant to O 18 r 19(1)(b), (c) and (d) of the Rules of Court 2012. The grounds for the application were: (a) TP7 had never been appointed as a member of the plaintiff; (b) TP7's attendance at the relevant meetings of the plaintiff was merely as an observer and he had no authority to make any decisions; (c) since he was not a member of the plaintiff, he did not owe any fiduciary duty to the plaintiff; and (d) on the facts, defendant had no basis whatsoever to make any claim against TP7 for contribution and/or indemnity. It was submitted by TP7 that in the present case, it was clear and obvious that the claim of the defendant was unsustainable and ought to be struck out. The defendant on the other hand submitted that Circular No 3 of 1998 was clear ie that any board members including replacement members are to be held collectively responsible for all decisions made by the board of the plaintiff ('the defendant's submission').

Held, allowing TP7's application with costs of RM5,000:

(1) The plaintiff was a statutory authority having powers and obligations vested by statute. A participant at its meetings on behalf of a member, as

in the case of TP7, who was not appointed as a member or substitute member in accordance with the statute that established the authority, in the present case the Port Authorities Act 1963, could not render him liable for any decision made by the authority. In this context, any party unauthorised to participate in the decision-making process cannot in law be held contributorily liable for the decision made or action taken thereof (see para 9).

(2) The defendant's statement of claim expressly pleaded that TP7 was a representative of the Ministry of Transport and not a substitute or alternate member of the plaintiff. Hence, no liability or collective responsibility could be attached to TP7 in this capacity. Therefore, the defendant's submission was wholly misconceived and untenable (see para 17).

(3) On principal, the above grounds, the defendant's claim for contribution or indemnity against TP7 in respect of plaintiff's pleaded claim against defendant was scandalous, frivolous and vexatious and/or prejudicial to a fair trial of the matter or otherwise an abuse of the court process. This was plainly a fit and proper case where the summary procedure could be rightly adopted to struck out defendant's pleading against TP7 as it could be clearly seen that the claim was on the face of it obviously unsustainable without any reasonable prospect of success that warranted a trial on the merits (see para 18).

[Bahasa Malaysia summary

Port Klang Authority ('plaintif') membawa tindakan terhadap defendan berdasarkan pelanggaran tugas fidusiari oleh defendan yang mana menyebabkan kerugian dan kerosakan kepada plaintif berkaitan Projek Zon Bebas Pelabuhan Kelang ('projek'). Defendan sebaliknya memfailkan prosiding pihak ketiga terhadap ahli-ahli lembaga plaintif dan memohon sumbangan daripada ahli-ahli lembaga atas alasan bahawa mereka adalah terlibat secara bersama di dalam proses membuat keputusan kolektif bagi projek tersebut. Dalam menjawab kepada prosiding pihak ketiga, pihak ketiga ketujuh ('TP7') telah memfailkan permohonan ini untuk membatalkan pernyataan tuntutan defendan berikutan A 18 k 19(1)(b), (c) dan (d) Kaedah-Kaedah Mahkamah 2012. Alasan untuk permohonan adalah: (a) TP7 tidak pernah dilantik sebagai ahli plaintif; (b) kehadiran TP7 di mesyuarat relevan plaintif hanyalah sebagai pemerhati dan dia tidak mempunyai kuasa untuk membuat apa-apa keputusan; (c) memandangkan dia bukan sebagai ahli plaintif, dia tidak menanggung apa-apa tugas fidusiari kepada plaintif; dan (d) atas fakta, defendan langsung tidak mempunyai asas untuk membuat apa-apa tuntutan terhadap TP7 bagi sumbangan dan/atau indemniti. Ia dihujahkan oleh TP7 bahawa dalam kes ini, ia adalah jelas dan nyata bahawa tuntutan defendan tidak boleh dikekalkan dan patut dibatalkan. Defendan sebaliknya berhujah bahawa Pekeliling No 3 Tahun 1998 adalah jelas iaitu

bahawa mana-mana ahli lembaga termasuk ahli-ahli penggantian bertanggungjawab secara kolektif bagi kesemua keputusan yang dibuat oleh lembaga plaintif ('hujahan defendan').

Diputuskan, membenarkan permohonan TP7 dengan kos sebanyak RM5,000:

(1) Plaintif adalah pihak berkuasa statutori dengan mempunyai kuasa dan tanggungjawab yang diletakhakkan oleh statut. Peserta di mesyuarat bagi pihak ahli, seperti dalam kes TP7, yang tidak dilantik sebagai ahli atau ahli pengganti mengikut statut yang menggubal kuasa tersebut, dalam kes ini Akta Pihak Berkuasa Pelabuhan 1963, tidak boleh menyebabkannya bertanggungjawab untuk apa-apa keputusan yang dibuat oleh pihak berkuasa. Dalam konteks ini, mana-mana pihak tidak dibenarkan mengambil bahagian dalam proses membuat keputusan tidak boleh dari segi undang-undang dipertanggungjawabkan secara sampingan bagi keputusan yang dibuat atau tindakan yang diambil daripadanya (lihat perenggan 9).

(2) Pernyataan tuntutan defendan secara nyata memplidkan bahawa TP7 adalah wakil Kementerian Pengangkutan dan bukan pengganti atau ahli silih ganti plaintif. Maka, tiada liabiliti atau tanggungjawab kolektif boleh dikenakan kepada TP7 dalam kapasiti ini. Oleh itu, hujahan defendan secara keseluruhannya adalah salah tanggap dan tidak dapat dipertahankan (lihat perenggan 17).

(3) Pada dasarnya alasan di atas, tuntutan defendan untuk sumbangan atau indemniti terhadap TP7 berkaitan tuntutan rayuan plaintif terhadap defendan adalah bersifat skandal, remeh dan menyusahkan dan/atau memudaratkan kepada perbicaraan yang adil terhadap perkara atau sebaliknya penyalahgunaan proses mahkamah. Ini adalah kes yang layak dan sesuai di mana prosedur ringkas boleh digunakan secara betul untuk membatalkan pliding defendan terhadap TP7 kerana ia boleh dilihat secara jelas bahawa tuntutan tersebut adalah pada dasarnya jelas tidak boleh dikekalkan tanpa apa-apa prospek kejayaan yang munasabah yang mewajarkan perbicaraan atas merit (lihat perenggan 18).]

Notes

For cases on statement of claim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9458–9521.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

CC Ng & Brothers Sdn Bhd v Government Of State Of Pahang [1985] 1 MLJ 347, FC (refd)

A *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192, CA (refd)

Legislation referred to

Port Authorities Act 1963 s 2(1), (4), (8)
B Rules of Court 2012 O 18 r 19, 19(1)(b), (1)(c), (1)(d)

Kwan Will Sen (Skrine) for the plaintiff.
Lim Kee Wai (Lavinia Kumaraendran with him) (Thomas Philip) for the defendant.
C *P Jeyakumar (Nur Hidayah bt Saidi with him) (Zahir, Jeya & Zainal) for the first third party.*
J Doshi (Abdullah & Zainudin) for the second to 24th and 26th third parties.

Gunalan Muniandy JC:

D

[1] This is the seventh third party's ('TP7') application to strike out the defendant's ('D') statement of claim ('SOC') against the TP7 pursuant to O 18 r 19(1)(b), (c) and (d) of the Rules of Court 2012 ('the ROC'). In the affidavit in support of L73 the grounds relied upon by TP7 are briefly these:
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(a) TP7 had never at any instance during the material time been appointed as a member of the plaintiff ('PKA');

(b) TP7's attendance at the relevant meetings of the PKA was merely as an observer whereby he had no powers or authority to make any decision;
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(c) being a non-member of the PKA, he, thus, did not owe any fiduciary duty to PKA; and

(d) on the above facts, D had no basis whatsoever to make any claim against TP7 for contribution and/or indemnity. On these grounds, it was submitted that in this case it is clear and obvious that the claim of the defendant as against TP7 is unsustainable. Hence, this is a clear case where the summary procedure ought to be applied to strike out the defendant's claim as against TP7 for contribution and/or indemnity.
G

H

MATERIAL FACTS

[2] Briefly, the salient facts pertaining to the matter in dispute are set out in the defendant's submission as follows:
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> On 8.10.2009, the plaintiff, Port Klang Authority ('PKA') filed an action against the defendant. The claim was allegedly premised on breaches of fiduciary duties causing loss and damage to PKA in relation to the Port Kelang Free Zone Project ('PKFZ Project').

In her defence, D had pleaded that any decisions made in respect of the PKFZ Project were as a result of the collective responsibility of the Board members of PKA, all of whom were approved by the relevant ministries who are represented on the Board of PKA.

In line with the stand taken by the defendant, third party proceedings were initiated against Board members and/or representatives of Board members of PKA throughout the defendant's tenure with PKA.

The third party proceedings were initiated to seek contribution from the Board members of PKA (hereinafter referred to as 'Third Parties') on the premise that they were jointly involved in the collective decision making process for the PKFZ Project. As such, the responsibilities and duties were collectively owed to PKA and cannot be attributed to an individual alone.

THE LAW ON STRIKING OUT OF PLEADINGS

[3] It is trite law that the court should only exercise its discretionary powers in exceptional circumstances to strike out a statement of claim where it is a plain and obvious case or if the claim is obviously unsustainable with no prospect of success. The leading authority on striking out is *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 where Mohamed Dzaiddin SCJ (later CJ) lucidly expressed the principles applicable to the exercise of this power to be these:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or defence ...

[4] On the inherent jurisdiction of the court to strike out a writ and/or a SOC, Seah FJ (as he then was) in *CC Ng & Brothers Sdn Bhd v Government Of State Of Pahang* [1985] 1 MLJ 347 remarked:

> In our judgment, this is not a proper time to consider these rival submissions when the inherent jurisdiction of the court is invoked to strike out a writ and/or a statement of claim on the ground that it was an abuse of the process of the court. The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercise with the utmost caution (per Lord Diplock in *Tractors Malaysia Bhd v Tio Chee Hing*). In *Lawrence v Norreys* Lord Herschell said words to the same effect that 'It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified

merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved'. In our opinion, the question posed before the learned judge ought to be decided at the trial.

[5] As to the meaning of 'scandalous' and 'abuse of the process of the court', Low Hop Bing JCA in *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192 stated:

> In the context of O 18 r 19(1)(b), the word 'scandalous' means wholly unnecessary and irrelevant, and not just unpleasant allegations. A pleading is 'frivolous or vexatious' when it is obviously unsustainable.
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> An 'abuse of the process of the court' arises under O 18 r 19(1)(d) where the process of the court has not been used in a bona fide manner and has been abused.

ANALYSIS AND FINDING

[6] The TPN claims contribution from all the third parties ('TPs'), including TP7, explicitly on the ground that the actions and/or decisions of the PKA at the material time were the decisions taken by the PKA of which all the TPs were then members and therefore, collectively liable for the claim by P. The defendant alleges that the TPs are statutory appointees pursuant to the Port Authorities Act 1963 and/or representatives of MOF ('Ministry of Finance') or MOT ('Ministry of Transport'). Hence, the whole basis of the TPN against TP7 was that he was then a member of the PKA. Nowhere in the TPN is it averred that the defendant's action against TP7 is based on his participation in the PKA meetings in his representative capacity or as a non-member without decision-making powers. The entire claim against the third parties ('TPs') is based on their decision-making powers and role as members of the PKA in respect of the said decision and actions of the PKA which are the subject of P's claim.

[7] In his submission TP7 highlighted the fact that the defendant's SOC makes it clear and explicit that TP7 was at the material time:

(a) not appointed by Yang di-Pertuan Agong as a chairman of the plaintiff authority ('PKA');

(b) not appointed by the Minister as a deputy chairman of the plaintiff authority;

(c) not appointed by the Minister as a member of the plaintiff authority;

(d) not appointed by the Yang di-Pertuan Agong as a temporary chairman; and

(e) not appointed by the Minister as a temporary member.

[8] The D does in her affidavit in opposition not dispute the fact that TP7 was not a member of the PKA at the time of the meetings when the impugned decisions were taken but asserts that TP7 participated in the meetings as a representative of the Ministry of Transport ('MOT') in the absence of TP3 who was the Vice Chairman of the PKA as the authorised representative of the MOT. Mere participation at the PKA meetings, however active, as a representative of the MOT did not amount to TP7 becoming a member or substitute member of the PKA nor confer on him decision making powers and make him collectively liable for the decisions and/or actions of the PKA. In seeking to set aside the TPN, TP7 categorically averred that:

(a) he was NEVER appointed as a temporary member of PKA;

(b) he was NEVER appointed as a Deputy Chairman;

(c) he NEVER attended the meetings of the plaintiff authority as a member, temporary member or Deputy Chairman in place of the 3rd Party;

(d) he only attended the plaintiff's meetings AS AN OBSERVER;

[9] The PKA is a statutory authority having powers and obligations vested by statute. A participant at its meetings on behalf of a member, as in the case of TP7, who was not appointed as a member or substitute member in accordance with the statute that established the authority, cannot render him liable for any decision made by the authority. In this context, any party unauthorised to participate in the decision-making process cannot in law be held contributorily liable for the decision made or action taken thereof. An administrative circular referred to by D cannot confer legal authority on or attach legal liability to TP7 who was never appointed as substitute member or 'Ahli Ganti' in accordance with the governing statute. In fact, there is no provision under the 1963 Act empowering this kind of appointment to be made.

[10] A perusal of the relevant and provisions of the Port Authorities Act 1963 ('the PAA') under which the PKA was established would make the position of TP7 abundantly clear.

[11] Section 2(1) of the PAA provides that:

Port Authorities

2 Establishment of port authorities

(1) There shall be established in respect of every port specified in the first column of the First Schedule a port authority (hereinafter referred to as 'the authority') which shall be a body corporate to be known by the name specified in the corresponding second column of the Schedule, and such authority shall be established on the date specified in the third column of the said Schedule.

[12] Section 2(4) of the same Act states as follows:

> (4) The authority shall consist of a Chairman who shall be appointed by the Yang di-Pertuan Agong and —
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> (a) the General Manager for the time being of the port; and
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> (b) not less than five nor more than nine members, to be appointed by the Minister:
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> Provided that it shall be lawful for the Yang di-Pertuan Agong to appoint the General Manager as the Chairman of the authority.

[13] It is crystal clear that nowhere in the Act is there provision for a representative of a member of the authority concerned duly appointed by the Minister to be regarded as a member of the authority having responsibilities and powers prescribed therein. Neither is there any provision for the appointment of a relief or substitute member. As such, a position of this kind is not recognised under the PAA.

[14] It is only the Yang di Pertuan Agong and the minister respectively who are empowered to appoint a temporary chairman or a temporary member.

(See s 2(8) of the PAA).

[15] With regard to TP7's primary assertion that he was not a board member of PKA and that accordingly, he did not owe any fiduciary duties to PKA, the defendant submitted that Circular No 3 of 1998 (specifically provision 5.4.1) is clear ie that any board members including replacement members are to be held collectively responsible for all decisions made by the board of PKA.

[16] For convenience, the above circular, in so far as relevant to this instance, provides in para 5.4.1 that:

> Ahli Lembaga Pengarah, termasuk Ahli Ganti, adalah bertanggungjawab secara bersama bagi semua keputusan Lembaga dan semua kegiatan Badan Berkanun. Adalah menjadi kewajipan setiap Ahli Lembaga Pengarah untuk hadir dan mengambil bahagian di dalam semua mesyuarat Lembaga. Ketidakhadiran seseorang Ahli atau kegagalan seseorang Ahli mengambil bahagian di dalam perbincangan mesyuarat Lembaga tidak melepaskan Ahli itu dari bertanggungjawab ke atas semua keputusan yang dibuat oleh mesyuarat berkenaan.

[17] Apart from the fact that there is no provision in the PAA for the appointment of a substitute member of the board, there is no record produced of TP7 having ever been appointed as a substitute or alternative member. More importantly, the defendant's SOC pleads expressly that TP7 was a representative of the MOT not a substitute or alternate member of PKA.

Hence, no liability or collective responsibility can be attached to TP7 in this capacity. Therefore, the defendant's submission on this point is wholly misconceived and untenable.

[18] On principally the above grounds, I uphold TP7's contention that D's claim for contribution or indemnity against TP7 in respect of P's pleaded claim against D is scandalous, frivolous and vexatious and/or prejudicial to a fair trial of the matter or otherwise an abuse of the court process. This is plainly a fit and proper case where the summary procedure can be rightly adopted to strike out D's pleading against TP7 as it can be clearly seen that the claim is on the face of it obviously unsustainable without any reasonable prospect of success that warrants a trial on the merits.

[19] I, therefore, allow this application on the grounds expressed in support under O 18 r 19 of the ROC.

[20] Order in terms of prayers 1 and 2.

[21] Costs of RM5,000 to TP7 to be borne by the defendant.

TP7's application allowed with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar